

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 09 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MARTIN JIMENEZ CASTRO,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-73858

Agency No. A95-310-180

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted February 7, 2006
Pasadena, California

Before: PREGERSON, W. FLETCHER, and BYBEE, Circuit Judges.

Martin Jimenez Castro was charged as an alien in the United States without having been admitted or paroled. He applied for cancellation of removal pursuant to 8 U.S.C. § 1229b(b)(1), arguing that his removal would cause his American citizen son “exceptional and extremely unusual hardship.” An immigration judge

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

(“IJ”) denied him this relief but granted his application for voluntary departure.

On May 11, 2004, the Board of Immigration Appeals (“BIA”) upheld the IJ’s decision on appeal. Castro did not file a petition for review of that decision.

Castro filed a timely “Motion to Reconsider and for Stay of Removal/Deportation” on May 21, 2004, but he identified no errors of fact or law and instead asserted the same hardship argument he made in his appeal. The BIA denied his motion on July 8, 2004. In denying the motion, the BIA noted that Castro had remained in the United States after the thirty-day voluntary departure period lapsed, and accordingly he could not apply for cancellation of removal for 10 years. *See* 8 U.S.C. § 1229c(d)(1). Castro filed a timely petition for review of the BIA’s denial of his motion to reconsider.

A motion to reconsider must identify errors of fact or law in the BIA’s decision denying an appeal. 8 C.F.R. § 1003.2(b)(1). In his motion to reconsider, Castro did not identify any such errors in the May 11 order. The BIA therefore did not abuse its discretion when it denied the motion to reconsider. *See Membreno v. Gonzales*, 425 F.3d 1227, 1230 (9th Cir. 2005) (en banc).

The BIA’s conclusion that Castro violated the terms of the voluntary departure order by staying in the United States for longer than thirty days was in error. A timely-filed motion to reconsider tolls a voluntary departure period. *See*

Azarte v. Ashcroft, 394 F.3d 1278, 1289 (9th Cir. 2005); *see also Barroso v. Gonzales*, 429 F.3d 1195, 1205 (9th Cir. 2005). Castro had twenty days remaining before his voluntary departure period expired when he filed his motion to reconsider, and this time may be reinstated. *See Desta v. Ashcroft*, 365 F.3d 741, 750 (9th Cir. 2004).

Castro's petition for review is DENIED in part and GRANTED in part. A 20-day period of voluntary departure shall commence upon the issuance of the mandate.